BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

1.

OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals has not been yet officially reported. It is contained in the printed record.

2.

JURISDICTION

(a) This case is concerned with the protection of a citizen of a State in his right of privacy and to the enjoyment of a good reputation, from libelous publications contained in a magazine published by one domiciled in another State, but publishing such magazine with the actual intent and purpose that it be circulated and sold in the State where such citizen is domiciled. In this case such magazine was actually circulated and sold through wholesale distributors, the publisher retaining title to the magazine even after the issue had passed into the hands of the distributor. That the citizen so wronged should be guaranteed the right of redress by suit in the appropriate courts of original jurisdiction within the State where he is domiciled, is submitted by petitioner to be a question of grave importance to the jurisprudence of the United States such as should be determined by this Court.

(b) The opinion of the Circuit Court of Appeals, in holding that under the evidence in this case the Respondent, Street & Smith Publications, Inc., was not doing business in the State of Texas at the time service was had upon its agent, Page, is conceived by petitioner to be in direct conflict with the decisions of the Supreme Court of the United States in the cases of WILCOX & GIBBS SEWING MACHINE COMPANY V. EWING, 141 U. S. 627, 35 L. Ed. 882; and INTERNATIONAL HARVEST-

ER COMPANY OF AMERICA V. KENTUCKY, 234 U. S. 579, 58 L. Ed. 1479, in that in each of such cases, under a legal situation created by facts approximating those in the instant case, the Supreme Court held that the Corporation was present and doing business in the State where suit instituted, whereas in the instant case the Circuit Court of Appeals has held that Respondent was not present and doing business in the State of Texas where suit was instituted.

3.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred in holding that under the facts of this case Respondent was not present and carrying on business in the State of Texas, at the time service was had upon its agent, and upon such holding, reversing the cause with instructions to the District Court to sustain Respondent's pleas to quash the jurisdiction.

4.

ARGUMENT

The magazine in question, which is one of many magazines published by Respondent, was published with the intent upon the part of Respondent that it would be distributed, sold and circulated by it in all of the States of the United States and many foreign countries. Indisputably, Respondent is engaged in interstate commerce. While it did not procure a permit to do business within the State of Texas, it entered into a contract with Page, a citizen of the State of Texas, for the distribution of the magazines published by it (R. 26-31), the pertinent provisions of which are as follows:

In paragraph 5 of Subdivision B, Page is required to:

> "Supply and deliver all periodicals and magazines sent to him by the Company to retailers includ-

ing street and carrier venders, for resale to the public, on, but not before their regular publication dates, and at authorized prices. To also pick up and credit his dealers with all unsold copies of magazines within proper time limits set by the Company."

In paragraph 6 of Subdivision B, he is required to:

"Keep all his customers at all times adequately supplied with the periodicals and magazines circulated by the Company by re-supplying, as often as may be necessary, those who sell out before the next publication."

In paragraph 7 Subdivision B, he is required to:

"Extend the distribution of the Company's magazines and periodicals by constant and intelligent efforts to increase the sales of the old retailers and to add new retailers whenever such dealers are in a position to sell said magazines and periodicals."

In paragraph 8 of Subdivision B, he is required to:

"Distribute to retailers, advertising matter, dealer's helps, posters, circulars, and other material which may be provided by the Company."

In paragraph 10 of Subdivision B, he is required:

"To tear or cut in half or otherwise render useless for reading purposes all coverless (otherwise known as returns) copies of the Street & Smith magazines and periodicals before disposing of same to any paper dealer or otherwise."

And it is further provided:

"It is understood that title remains with the Company until returns are so destroyed."

It is provided in paragraph 11 of Section B that Page is to:

"Make no less than two deliveries of the Street & Smith magazines and periodicals each week, i. e., on Wednesday and Friday. If it is determined by the Company that three deliveries are necessary to serve the best interest of the publications distributed under this agreement, the Distributor hereby agrees to increase the deliveries to three each week."

In paragraph 1 of Subdivision C, it is provided that the contract may be terminated among other things for "unsatisfactory service as agent of the Company."

We submit that this contract admits but one construction, and that under its terms the Respondent is shown to be engaged in the business of selling its magazines and periodicals within the State of Texas, and that in this business Page is exactly what the parties themselves, in making the contract, describe him as being—"agent of the Company."

The contract specifically provides that title to the magazines does not pass in the State of New York. It specifically controls the disposition which Page is to make of such magazines after they are received by him, states how and when he is to distribute them to retail dealers, when he is to pick up unsold copies, and again specifically provides:

> "It is understood that title remains with the Company until returns are so destroyed."

If Respondent has title to its magazines while they are in Texas, most certainly it is publishing and selling these magazines in Texas. Page, by the contract, is not required to remit for any magazines, except those which the retail dealers, to whom he distributes them, sell to the public. He is credited with all others when he returns the covers, and title to these "coverless magazines remains with the Company" until they are torn or cut in half or otherwise rendered useless for reading purposes.

Page is required by the contract to "extend the distribution of the Company's magazines and periodicals by constant and intelligent efforts" and to "distribute to retailers, advertising matter, dealer's helps, posters, circulars, and other material which may be provided by the Company."

We call attention to the testimony of Mr. Page, appearing on pages 65 to 85 of the Record, and the following specific portions thereof:

> "Q. They send you at their discretion, unless your order differs, whatever amount of magazines they think can be sold here?

A. Yes, sir." (R. 74.)

* * * * * * * * * * * *

"Q. They maintain traveling salesmen making trips through Texas, do they not?

A. We have had people call on us.

Q. Traveling for Street & Smith Publications?

A. Yes, sir.

Q. What did they talk to you about when they called on you?

A. They tried to interest us in buying more of their magazines.

Q. To pick up the trade as far as possible?

A. Yes, sir.

Q. This sale of Street and Smith Publications in a town is a continuous matter?

A. Yes, sir, in Texas for years and years and years.

Q. They sell them every week?

A. Yes, sir.

Q. Weekly magazines, semi-weekly magazines, monthly and semi-monthly magazines?

A. Yes, sir." (R. 76.)

The testimony of Mr. Henry W. Ralston, Respondents vice-president (R. 107-111), establishes that Street & Smith Publications does ship and deliver magazines published by it to dealers and distributors within the State of Texas, on each and every week in the year, and have done so for a number of years.

His further testimony is:

"18. It is a further fact, is it not, that Street & Smith Publications, Inc., is paid for these magazines by the persons or companies within the State of Texas to whom the same are shipped or delivered?
Not entirely so. The American News Company pays for its branches' magazines on blanket invoices.

19. Does Street & Smith Publications, Inc., ever send any employees or representatives into the State of Texas?
Yes.

20. If so, please name such employee or representative, giving his or their address or ad-

dresses, and state what such employee or representative does on these trips?
We have had during a number of years various employees, all of whose names I cannot remember, who are sent not only into Texas but into many other adjacent states. The employee we send around about once or twice a year merely looks over stands of retailers who buy magazines from the independent wholesalers and sell same to the ultimate reader. These retailers sell perhaps 100 different magazines put out by at least 20 different publishers. Our employee will look over the stand, see how magazines published by Street & Smith are set up and will offer suggestions to the retailers as to how the magazines may be better displayed on his stand or how the advertising matter he has might be used to better advantage. He does not in any way interfere with the conduct of the retailer's business and, if the retailer does not wish any suggestion or advice, he receives none. Our representative makes no collections from anybody to whom we sell our publications. It is unnecessary to do so because all accounts are guaranteed by a deposit left with us in this City.

21. Is it or not a fact that one of the duties of such representative is to look over the stand of a retailer, observe how the magazines published by Street & Smith Publications, Inc., are set up on the stand, and to offer to such retailers suggestions as to how the magazines may be better displayed, or the advertising matter furnished be used to better advantage?
Yes, but only if the retailers desire suggestions.

22. In other words, it is the duty, is it not, of such representative to cooperate with the dealer in any way he can, to promote and increase the sales of magazines published by Street & Smith Publications, Inc?
Except to the extent mentioned above, this traveling man has no other duty." (R. 109-110.)

On page 142 of the Record is shown a list of magazines published by Street & Smith Publications, Inc., and which such witness testified were sold and distributed in

Texas, and on pages 160, 161 and 162 is shown a record, testified to by the witness, of the sales in Texas, of the magazine containing the alleged libelous article, showing the distribution of 3165 copies thereof in Texas.

The case of WILCOX & GIBBS SEWING MACHINE COMPANY V. EWING, 141 U. S. 627, 35 L. Ed. 882, construes a contract in many respects similar to that under investigation here. It is said:

> "There was some discussion at the bar as to whether Ewing was, strictly, an agent of the company. We think he was. He was none the less an agent because of his appointment as 'exclusive vendor' of the defendant's machines within a particular territory or because of the peculiar privileges granting to or the peculiar restrictions imposed upon him. * * * * * The agreement constituted him the sole agent of the company for the sale of its machines within a certain territory. It is true that the machines he undertook to sell were to be purchased by him from the company at a large discount. But he could not sell them by retail below the regular retail prices. This arrangement was the mode adopted to protect the company's interests, and to secure the plaintiff such compensation for his services as would induce him to devote his time, attention and abilities to the company's interests. He was still a mere agent to sell such machines as might be delivered to him under the contract."

In the case of INTERNATIONAL HARVESTER COMPANY V. KENTUCKY, 234 U. S. 579, 58 L. Ed. 1479, supra., such company had evidently made a studied and planned program to avoid legal service in the State of Kentucky: it entered into a written contract with its agents to effect such. While permitting them to make sales in Kentucky, each and every paragraph was breathing with limitations manifestly drawn so as to restrict the power of agency. The contract drawn was not dissimilar to the one now before the Court. In that case the Supreme Court held that the Harvester Company was present and doing business in Kentucky so as to be amenable to process there.

The contract between Respondent and Page was very definitely winthin the rule laid down in 2 C. J. 420, paragraph 4, wherein it is said:

> "The most characteristic feature of an agent's employment, in a legal sense, is that he is employed primarily to bring about business relations between his employer and third persons, and this power is perhaps the most distinctive mark of the agent as contrasted with others, who act in representative capacities."

Cases definitely supporting petitioner's contentions that the District Court had jurisdiction to try this case and dispose of the issues involved upon the merits, are BOARD OF TRADE V. HAMMOND ELEVATOR COMPANY, 189 U. S. 424, 49 L. Ed. 1111, and REAL SILK HOSIERY MILLS V. PHILADELPHIA KNITTING MILLS CO. (3rd Circuit) 46 F. 2d 25.

In this connection, may we say, it appears to us that there is a wide difference between the merchandising of automobiles, and other articles of commerce, and the business of publishing and distributing magazines and periodicals. This difference was recognized in CLEMENTS V. MacFADDEN PUBLICATIONS (D. C. E. D. TEX), 28 F. Supp. 274, the Court saying:

> "To carry the present line of holdings to any greater extent than they now exist could easily result in a publication two thousand miles away destroying a man's reputation, whether he be great or small, and requiring him to come to unfriendly territory perhaps, to effect his vindication in the courts of justice. For this reason and for others it is manifest that the shipment and circulation of printed documents should hardly be grouped and classed with ordinary articles of merchandise."

In this case, as is shown by the pleadings and evidence introduced, Respondent, though actually printing its magazine in the State of New York, brought that magazine to the community in the State where Petitioner resided, and there, upon his doorstep, and among his neighbors, sold the magazine which contained the libelous

publication concerning him. It would be a strange rule of law which would hold that Respondent could come to Petitioner's home in Texas and strike at him with words no less deadly than bullets, and yet hold that he could obtain no redress in Texas, because in selling its libelous publication in Texas "it was not present and doing business in Texas."

5.

Petitioner respectfully prays that Writ of Certiorari be granted, and that upon hearing of this cause, the judgment of the Circuit Court of Appeals reversing that of the District Court, be reversed, and the judgment of the District Court affirmed.

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